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IN THE

# Supreme Court of the United States

NICHOLAS PAPPAS, *et al.*,

*Petitioners,*

*v.*

GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Does the First Amendment of the United States Constitution bar civil courts from adjudicating ecclesiastical matters of internal church governance of a hierarchical church?

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## STATEMENT OF THE CASE

Petitioners seek to dictate the fashion in which the Archdiocese is governed. Church governance is a purely ecclesiastical matter that even Petitioners admit may not be reviewed by the judiciary. In an effort to avoid such bar, Petitioners simply ignore the substance of the 2003 Charter. Petitioners describe the dispute as concerning "contracts" and "corporate documents," while avoiding the fact that the alleged "contract" deals with ecclesiastical matters, such as providing for the elevation of bishops to the higher rank of Metropolitan, establishing criteria for the elevation of a priest to the position of Metropolitan or Archbishop, and setting forth rules for the oversight of monasteries. Petitioners avoid the very document they challenge because the matters it covers obviously fall outside the scope of judicial review. Indeed, recognizing the fact the courts will not operate churches, on appeal Petitioners abandoned their request for an injunction mandating governance in accordance with the 1977 Charter. Petitioners' remaining request to declare the 2003 Charter invalid, without actually barring the Archdiocese from following the Charter, seeks a purely advisory an opinion and, consequently, is not justiciable.

Petitioners' entire Complaint is premised on the incorrect allegation that the Ecumenical Patriarchate did not have the authority to grant a new Charter to the Archdiocese in 2003 without either approving certain amendments that were requested by the Clergy-Laity Congress of the Archdiocese or obtaining the approval of the Clergy-Laity Congress. The Ecumenical Patriarchate has determined that it has such authority, and nothing in the governance documents of the Archdiocese is to the contrary. The United States Supreme Court's decision in *Serbian Eastern Orthodox Diocese U.S.A.* v. *Milivojevich*, 426 U.S. 696 (1976) is directly on point and bars this action. Under the First Amendment, a plaintiff may not ask a court to substitute its judgment for that of a

hierarchical church's highest authority on matters of internal church governance, as the New York State Appellate Division, First Department, correctly held.[1] The law in this area is settled. Contrary to Petitioners' assertion, there is no conflict among the state courts on the issue.

Petitioners also argue that that judicial deference to the Ecumenical Patriarchate's interpretation of the Charter impairs the right of contract of all parishioners. *Milivojevich* is on point and controlling on this point, as well. In *Milivojevich*, the Court refused to interpret provisions of church constitutions to resolve a dispute concerning ecclesiastical matters. Moreover, as this Court acknowledged in *Watson*, all parishioners in a hierarchical church consent to be governed by the decisions of the hierarchy, and agree to be bound by those decisions.

Regardless of the constitutional infirmity of the Complaint, the controversy is now moot because the Clergy-Laity Congress has operated under the new Charter for three years. Indeed, at its biennial convention in 2004, the Clergy-Laity Congress, comprised of over 1,000 delegates, even promulgated new regulations in conformity therewith.

*The Greek Orthodox Church*

The Greek Orthodox Church is a hierarchical church in which the ultimate control and authority for all matters within the church rests with the Holy Apostolic and Ecumenical Patriarchate of Constantinople (the "Ecumenical Patriarchate"). The Greek Orthodox Church is one of several "autocephalous," or ecclesiastically independent, churches of the Eastern Orthodox tradition.[2] The Greek Orthodox

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1. The New York State Court of Appeals declined to hear Petitioners' appeal.

2. The Serbian, Russian and Antiochian Orthodox Churches are other examples of autocephalous Eastern Orthodox churches.

Church shares a common bond and theology with other Orthodox churches, each of which is headed by a Patriarch (or equivalent), but all of which look for guidance to the Ecumenical Patriarchate as *primus inter pares* (first among equals). The head of each autocephalous church administers that church, but only the Ecumenical Patriarchate can convene a council of the churches (comprised of all bishops) to modify church doctrine.

The Ecumenical Patriarchate is the "Mother Church" and is comprised of the Holy and Sacred Synod of the Ecumenical Patriarchate (the "Holy Synod"). The Holy Synod is the Church's highest executive body and is comprised of twelve Metropolitans from around the world presided over by the Ecumenical Patriarch.

*The Archdiocese*

Within the United States, the Archdiocese, through its Eparchial Synod, is the highest spiritual and governing authority of the Greek Orthodox Church. The Archdiocese oversees the administration of the Direct Archdiocesan District in New York, and eight Metropolises (or dioceses), which in turn oversee approximately 540 Greek Orthodox parishes throughout the United States. There are approximately one million Greek Orthodox faithful in the United States. The Archdiocese was incorporated in 1921 pursuant to Section 15 of the Religious Corporations Law ("RCL") of the State of New York, although it existed as an unincorporated association prior to that.

The principal governance documents of the Archdiocese are the Holy Scripture, the Sacred Traditions and Holy Canons of the Greek Orthodox Church, its Charter, and the Special Regulations and Uniform Parish Regulations ("Regulations"). The Holy Canons have been developed over

the seventeen-hundred-year history of the Church and deal with, among other things, church organization and discipline.

The Ecumenical Patriarchate granted the first Charter of the Archdiocese in 1922, and all subsequent Charters. From 1977 to 2003, the Archdiocese was governed in accordance with a Charter granted by the Ecumenical Patriarchate in 1977 (the "1977 Charter"). The 1977 Charter was superseded by the new Charter granted by the Ecumenical Patriarchate in 2003 (the "2003 Charter").

*The Revision Of The Charter*

The process to revise the 1977 Charter began in 1995 when Archbishop Iakovos (now deceased) appointed a charter revision committee and culminated eight years later with the grant of the 2003 Charter by the Ecumenical Patriarchate. The charter revision committee was expanded by a unanimous vote of the Clergy-Laity Congress in 1998 to include one clergy and one lay person from each diocese. In 1999, a charter committee consisting of three bishops, two priests and three lay people (including a professor of canon law) was selected by the Eparchial Synod to draft the new charter. In May 2000, in conformity with the 1998 Clergy-Laity Congress resolution, representatives of every diocese within the Archdiocese met in New York to review and comment on the draft charter. A revised draft charter was sent to the Ecumenical Patriarchate for review in July 2000. The Ecumenical Patriarchate then appointed its own charter committee and the two committees met in joint session in Constantinople on four separate occasions. After some further revisions, the proposed charter was presented at a meeting of the Archdiocesan Council in December, 2001 and shortly thereafter distributed to all parishes which provided comments on the draft.

In July 2002, following seven hours of detailed discussion in plenary session, the Clergy-Laity Congress approved a motion requesting that the Ecumenical Patriarchate grant the new charter for the Archdiocese with certain modifications to the charter set forth in separate motions. The Ecumenical Patriarchate granted the proposed charter on January 18, 2003, but did not approve several of the requested modifications.

Under both the 1977 Charter and the 2003 Charter, the institutions and structure of the Archdiocese are largely the same. Under both Charters, all canonical and ecclesiastical matters not provided for in the Charter and Regulations are determined by the Holy Synod of the Ecumenical Patriarchate. (1977 Charter Art. I; 2003 Charter Art. 1(b)) Also under both Charters, the Clergy-Laity Congress concerns itself with all matters, except for dogmatic or canonical matters, which affect the life, mission, growth and unity of the Archdiocese of America, including the uniform administration of the Archdiocesan District, the Metropolises and Parishes, and the educational programs, financial programs and philanthropic concerns of the Archdiocese. (1977 Charter Art. XI; 2003 Charter Art. 10) All decisions of the Clergy-Laity Congress are submitted to the Ecumenical Patriarchate for approval and ratification. (*Id.*) Following their approval, the decisions must be faithfully adhered to by all parishes regardless of whether or not they were represented at the Clergy-Laity Congress at which they were adopted. (*Id.*)

The only material differences between the 2003 Charter and the 1977 Charter are purely ecclesiastical. The 2003 Charter: (i) elevates the Bishops of the Archdiocese to Metropolitans, a higher status within the Church as a whole, although their duties and rights within the Archdiocese remain largely unchanged (2003 Charter, Art. 7); (ii) changes

the name of the Synod of Bishops to the Holy Eparchial Synod (*id.*, Art. 5); (iii) specifies additional eligibility criteria for future candidates for the office of Archbishop (*id.*, Art. 13); (iv) modifies procedures for handling a vacancy in the office of Archbishop or Metropolitan (*id.*, Art. 12); (v) specifies more detailed procedures by which the Spiritual Courts function (*id.*, Art. 9); (vi) grants authority to the Eparchial Synod to designate, in consultation with the Archdiocesan Council, the number, seat and boundaries of the Metropolises within the Archdiocese, subject to the approval of the Ecumenical Patriarchate (*id.*, Art. 3(a)); (vii) provides for oversight of monasteries (*id.*, Art. 21); and (viii) provides a more detailed process for amending the Charter (*id.*, Art. 25). There are no other material differences between the two Charters.

At its meeting in July 2004, the Clergy-Laity Congress adopted new regulations to conform to the changes reflected in the 2003 Charter, and those regulations have been ratified by the Ecumenical Patriarchate. The new regulations expressly acknowledge that the 2003 Charter was granted by the Ecumenical Patriarchate, and repeatedly cross-reference various articles in the 2003 Charter. The Clergy-Laity Congress did not object to or disapprove of the 2003 Charter in any manner. Thus, the Clergy-Laity Congress has accepted the 2003 Charter as the operative charter of the Archdiocese.

*The Complaint*

The Complaint was filed by thirty-four persons, all of whom claim to be members of certain separately incorporated Greek Orthodox parishes. In actuality, this action is being prosecuted and financed by the Orthodox Christian Laity ("OCL"), which has no affiliation with the Archdiocese or any Greek parish. Four Plaintiffs demanded dismissal when

they realized they had been included in the case, and three additional Plaintiffs have refused to join the appeal.[3]

Ignoring the fundamental notion of separation of church and state, Petitioners ask the civil courts to direct the way in which the Archdiocese governs itself. The Complaint alleges that the 2003 Charter was improperly adopted, and seeks a declaration that the 1977 Charter, and not the 2003 Charter, is the governing Charter of the Archdiocese. In addition, the Complaint seeks a mandatory injunction requiring the Archdiocese and Archbishop Demetrios to govern in accordance with the 1977 Charter, and not the 2003 Charter. Although on appeal Petitioners purported to have "abandoned" their claim for injunctive relief, such a tactic renders their proposed case non-justiciable as seeking only an advisory opinion.

The New York State Appellate Division, First Department, properly affirmed dismissal of Petitioners' Complaint on the ground that the First Amendment bars adjudication of ecclesiastical matters of internal church governance, and the New York Court of Appeals declined to hear Petitioners' appeal.

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3. Upon information and belief, since the date of the trial court's order, two additional plaintiffs have died.

## REASONS FOR DENYING THE PETITION

### I. Petitioners Fail To Present A Meritorious Ground For Granting Certiorari

#### A. The Appellate Division Applied Settled Supreme Court Precedent

##### 1. The Appellate Division Correctly Ruled That The *Milivojevich* Decision Bars This Action

It is settled law that the First Amendment to the United States Constitution precludes civil courts from intervening in ecclesiastical matters, such as church governance, to resolve disputes involving religious organizations. *Serbian Eastern Orthodox Diocese for the U.S.A.* v. *Milivojevich*, 426 U.S. 696, 713 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 120-21 (1952). Matters of internal church government are at "the core of ecclesiastical affairs." *Milivojevich*, 426 U.S. at 721; *see Kedroff*, 344 U.S. at 116 (religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."). As this Court has noted:

> Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise][C]lause."

*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 341-42

(1987) (Brennan, J., concurring) (quoting Laylock, *Towards a General Theory of the Religion Clause: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)).

Here, there is no credible dispute that the Complaint asks the civil court to determine matters of church governance of a hierarchical church.[4] The Complaint seeks "a mandatory injunction requiring defendants to govern the Archdiocese in accordance with the 1977 Charter, not the [2003 Charter]." (Complaint at 13) Petitioners assert harm if the Archdiocese is permitted to "govern or continue to govern the Archdiocese under the [2003 Charter,] instead of the 1977 Charter" (*id.* ¶ 74), and allege that there is a genuine controversy and dispute "as to whether the 1977 Charter or the [2003 Charter] is the proper governing charter and bylaws of the Archdiocese" (*id.* ¶ 67).

Moreover, as the Appellate Division correctly decided, "if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch[ate] had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter." (App. 3a) The question of whether the Ecumenical Patriarchate has the power to approve the 2003 Charter without approving the separate amendments accompanying the 2003 Charter is purely an ecclesiastical matter that the Ecumenical Patriarchate is entitled to determine without interference from the courts. *See First Presbyterian Church* v. *United Presbyterian Church*, 62 N.Y.2d 110, 117, 464 N.E.2d 454, 458, 476 N.Y.S.2d 86, 90 (1984) (affirming dismissal of claims relating to right of local church to withdraw from the Presbytery because "the determination required an examination and interpretation of the authority of the

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4. Plaintiffs concede, as they must, that the Greek Orthodox Church is hierarchical. (Pet. 23)

Presbytery to permit or prevent withdrawal of a local church."); *Kedroff*, 344 U.S. at 115 (holding right of Archbishop to use and occupy cathedral was "strictly a matter of ecclesiastical government" and could not be constitutionally impaired by state statute).

This Court's decision in *Milivojevich*, which Petitioners all but ignore, is squarely on point and dispositive, as the Appellate Division correctly held. In *Milivojevich*, the Holy Assembly of the Serbian Orthodox Church (the "Mother Church") — also an Eastern Orthodox church — reorganized one Diocese (the American-Canadian Diocese) into three Dioceses and later removed and defrocked a bishop of the church who refused to recognize this Diocesan reorganization. *Milivojevich*, 426 U.S. at 703-05. A Diocesan Council of the American-Canadian Diocese submitted the proposed Diocesan reorganization to the Diocesan National Assembly, which issued a resolution repudiating the division of the Diocese into three Dioceses. *Id.* at 705. The defrocked bishop sued, seeking to enjoin the Mother Church from interfering with the assets of the Diocese (a religious corporation) and to have himself declared the true Diocesan Bishop. *Id.* at 706-07. The Illinois Supreme Court ruled that the bishop's removal was "arbitrary" because it was not done in conformity with that court's interpretation of the Church's constitution and penal code, and that the Diocesan reorganization exceeded the scope of the Mother Church's authority to effectuate such changes without Diocesan approval. *Id.* at 708.

The United States Supreme Court overturned the decision, ruling that no court can make such a determination once it is conceded that the challenged action was taken by the highest ecclesiastical tribunal of a hierarchical church. *Id.* at 708.

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible

> rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes). . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power (within a hierarchical) church so as to decide . . . religious law (governing church polity) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."

*Id.* at 708-09 (quoting *Md. & Va. Churches* v. *Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

The Supreme Court ruled that the Illinois Supreme Court impermissibly substituted its interpretation of the Diocesan and Mother Church constitutions for that of the church's highest ecclesiastical tribunals "in which church law vests authority to make that interpretation." *Id.* at 721.

> We will not delve into the various church constitutional provisions relevant to this conclusion for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such

> questions of church polity to the final province of the Holy Assembly.[5]

*Id.* (emphasis added). Even decisions of the highest authority of a hierarchical church that appear arbitrary (and there is no allegation that the Charter revisions here were arbitrary) must be respected by the courts. *Milivojevich*, 426 U.S. at 713-15 (rejecting any "arbitrariness" exception to the rule that "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them").

Here, the Holy Synod of the Ecumenical Patriarchate has determined that it has the power to grant the 2003 Charter without approving certain requested amendments. Nothing in the 1977 Charter or the Special Regulations prevents it from doing so. (*See* 1977 Charter, Art. XXIV) Indeed, the power to decide ecclesiastical matters that are not explicitly stated in the Charter or regulations is expressly reserved to the Ecumenical Patriarchate, which is the supreme governing authority of the Greek Orthodox Church. (*Id.*, Art. I) Moreover, the 1977 Charter itself recites that the Ecumenical Patriarchate modified that Charter prior to granting it, further underscoring the Ecumenical Patriarchate's historical power to do so. (*Id.*, Art. XXIII) Petitioners cannot have a civil court impose an interpretation of the 1977 Charter directly contradictory to the Ecumenical Patriarchate's interpretation (at the behest of only a handful of the million parishioners, in a case being prosecuted for a third-party intermeddler, the OCL). The courts simply do not have authority to determine for churches how they organize the titles to be bestowed upon their clerics, the ecclesiastical jurisdiction of their archbishops, and the other matters raised in this case.

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5. Like the Ecumenical Patriarchate of the Greek Orthodox Church, the Holy Assembly is the highest authority of the Serbian Orthodox Church. *See Milivojevich*, 426 U.S. at 699.

Petitioners do not criticize or seek to overturn *Milivojevich*, nor do they assert that the lower court misapplied *Milivojevich*. Moreover, Petitioners concede that the revisions to the Charter are "of a purely ecclesiastical character." (Pet. 23, n.14) Petitioners' discussion of *Milivojevich* is limited to a single sentence in which they weakly attempt to distinguish it, asserting that this case, unlike *Milivojevich*, "does not require a state court to undertake any inquiry into religious law in order to determine the validity of a canonical decision by a church tribunal to divest a bishop of his Episcopal and monastic rank because of his 'open defiance and rebellion against the church hierarchy.'" (Pet. 8-9) Petitioners misrepresent *Milivojevich*. As here, in *Milivojevich*, the church's highest authority made certain decisions concerning the internal governance of a hierarchical church; those decisions were not solely "canonical" and were not limited to defrocking a defiant bishop, as Petitioners suggest. Indeed, Petitioners here specifically challenge a provision of the 2003 Charter addressing the determination of diocesan boundaries, the matter squarely at issue in *Milivojevich*. Furthermore, in *Milivojevich*, as here, the church's decisions were challenged on the ground that they were made in violation of the procedural provisions of the church's constitution, not the church's "religious law," and the resolution of the controversy would require the court to substitute its own interpretation of that governance document for that of the church's highest ecclesiastical authority (here, the Ecumenical Patriarchate).

Petitioners also suggest that only matters of doctrine and faith are ecclesiastical, (Pet. 7 ("[T]he narrow focus of this case is not on any ecclesiastical issue of *doctrine* or canonical *discipline*." (emphasis in original)), ignoring numerous Supreme Court decisions holding that matters of internal church governance are also ecclesiastical. *Milivojevich*, 426 U.S. at 713; *Kedroff*, 344 U.S. at 116; *Watson* v. *Jones*, 80

U.S. 679, 732-33 (1871) ("a matter which concerns theological controversy, church discipline, *ecclesiastical government*, or the conformity of the members of the church to the standard of morals required of them" is a matter "over which the civil courts exercise no jurisdiction") (emphasis added).

### 2. The Appellate Division Correctly Ruled That The "Neutral Principles Of Law" Doctrine Does Not Apply

Contrary to Petitioners' contention, this dispute cannot be resolved by reference solely to "neutral principles of law." *See Jones* v. *Wolf*, 443 U.S. 595, 602-03 (1979); *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). Under the neutral principles of law doctrine, a court can review such secular documents as deeds, certificates of incorporation, by-laws and relevant state statutes when resolving a property dispute or purely secular matter. *First Presbyterian Church*, 62 N.Y.2d at 121, 464 N.E.2d at 460, 476 N.Y.S.2d at 93 (1984). If in the course of a neutral principles of law analysis, a question of religious doctrine or canon law arises, the Court must accept as binding the ruling of the highest ecclesiastical body on that issue. *Jones*, 443 U.S. at 604.

The "neutral principles of law" doctrine does not apply because the revision of the Charter that forms the basis of the Complaint does not involve any church property or other secular matter, as the Appellate Division correctly held. *See First Presbyterian Church*, 62 N.Y.2d at 121, 464 N.E.2d at 460, 476 N.Y.S.2d at 93; *Milivojevich*, 426 U.S. at 720 (court must accept as binding the decision of a hierarchical church that has only an "incidental effect" on property). Instead, the Charter revisions indisputably pertain to matters of purely internal governance, including elevating

the dioceses to "Metropolises" and the bishops to "Metropolitans," setting the eligibility criteria for future Archbishops, and specifying procedures for filling vacancies in the office of Archbishop or Metropolitan.

Moreover, Petitioners cannot point to any provision of the 1977 Charter that has been violated, and to which the Court could apply neutral principles of law. Petitioners' claim that the 2003 Charter is invalid rests upon the self-serving and utterly false allegation that the 1977 Charter prohibits the Ecumenical Patriarchate from modifying a proposed Charter before granting it. Article XXIV of the 1977 Charter contains no such prohibition:

> The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress as the need therefore arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification.

(App. 20a) Thus, the Ecumenical Patriarchate (who granted the 1977 Charter) has simply granted permission to the Clergy-Laity Congress to request changes to the charter, which request is subject to the Ecumenical Patriarchate's approval. The only prohibition is that the Clergy-Laity Congress cannot revise the Charter without the approval of the Ecumenical Patriarchate. Contrary to Petitioners' unstated premise, the Ecumenical Patriarchate is not a "rubber stamp" who must approve a requested charter, and do so in its entirety.

Petitioners also ignore the fact that the 1977 Charter expressly recognizes the power of the Ecumenical Patriarchate, as the supreme authority, to modify a proposed charter; the 1977 Charter was itself modified by the Ecumenical Patriarchate prior to being granted: "[The 1977

Charter] was submitted to the Ecumenical Patriarchate which has studied, *modified it*, and granted it in its present form to the Archdiocese." (1977 Charter, Art. XIII (emphasis added)) Petitioners further ignore that all canonical and ecclesiastical matters not addressed by the Charter are expressly governed by the decisions of the Ecumenical Patriarchate. (*Id.*, Art. I) Therefore, any determination concerning the power and authority of the Ecumenical Patriarchate would necessarily require this Court to consider seventeen hundred years of church history and make factual findings concerning the Ecumenical Patriarchate's historical power and authority over the institutions of the church. This is precisely what the Constitution prohibits, as this Court has held on numerous occasions. *See Milivojevich*, 426 U.S. at 713; *Kedroff*, 344 U.S. at 116; *Watson* v. *Jones*, 80 U.S. at 732-33.

To understand the extent to which Petitioners' complaint is addressed to ecclesiastical, rather than secular, matters, one need only consider how Petitioners would enforce a judgment against the Archdiocese. The Petitioners would somehow have to compel the Archdiocese to remove all signage bearing the words "metropolis" and bar priests and others from addressing Bishops as Metropolitans. The court would need to set aside, and then determine for itself, the appropriate jurisdictional boundaries of a particular Diocese, set aside the election of an Archbishop or Metropolitan, and determine for the Archdiocese the criteria for elevating priests and for overseeing monasteries. These are precisely the kind of entanglements with religious affairs that the First and Fourteenth Amendments forbid. Even more disturbing, the Complaint asks a civil court to compel the clergy of the Archdiocese to disobey the directives of the Ecumenical Patriarchate on these purely ecclesiastical matters, placing them at risk of being defrocked.

Apparently recognizing that, under the First Amendment, Petitioners cannot ask a court to so govern a church,

Petitioners on appeal purported to "abandon" their claim for injunctive relief. An appellate court is not the appropriate venue for amending pleadings. Nonetheless, Petitioners' abandonment leaves a claim for an impermissible advisory opinion and, therefore, is not justiciable.

### B. The Appellate Division's Decision Does Not Conflict With Decisions Of The State Appellate Courts

Contrary to Petitioners' contention, the decision below does not conflict with the decisions of other state appellate courts. Petitioners cite a litany of cases for the unremarkable proposition that courts may inspect church charters or constitutions and by-laws. (Pet. 11-12, n.4) Petitioners, however, ignore that the vast majority of those cases involved church property disputes in which the court properly applied the neutral principals of law doctrine to determine ownership of the property.[6] It is well established that civil courts may

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6. *Trinity Presbyterian Church* v. *Tankersley*, 374 So. 2d 861, 866 (Ala. 1979) ("In this case, the issues involved clearly dealt with property . . . ."); *Arkansas Presbytery of the Cumberland Presbyterian Church* v. *Hudson*, 344 Ark. 332, 334, 40 S.W.3d 301, 303 (2001) (action to quiet title); *Presbytery of Riverside* v. *Community Church of Palm Springs*, 90 Cal. App. 3d 910, 914-915, 152 Cal. Rptr. 854, 856 (1979) (action for "ejectment, recovery of property, quiet title and damages"); *Protestant Episcopal Church* v. *Barker*, 115 Cal. App. 3d 599, 604, 171 Cal. Rptr. 541, 542-43 (1981) (dispute over title to church property); *Korean United Presbyterian Church of Los Angeles* v. *Presbytery of the Pacific*, 230 Cal. App. 3d 480, 485-86, 281 Cal. Rptr. 396, 398 (1991) (dispute over ownership, use and control of church property); *California-Nevada Annual Conference of the United Methodist Church* v. *St. Luke's United Methodist Church*, 121 Cal. App. 4th 754, 761, 17 Cal. Rptr. 3d 442, 448 (2004) ("We should note here, for purposes of clarity, that the parties agreed that the subject of the litigation was the St. Luke's real property . . . ."); *Bishop and Diocese of Colorado* v. *Mote*, 716 P.2d 85, 87

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(Colo. 1986) ("dispute over the control of the real and personal property of St. Mary's Church in Denver"); *Rector, Wardens and Vestrymen* v. *Episcopal Church*, 224 Conn. 797, 799, 620 A.2d 1280, 1281 (1983) ("This appeal involves a dispute over the ownership of church property . . . ."); *East Lake Methodist Episcopal Church, Inc.* v. *Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798, 800-01 (Del. 1999) ("In this appeal . . ., we examine the legal standards that govern disputes over church property between local congregations and general ecclesiastical authorities."); *Crumbley* v. *Solomon*, 243 Ga. 343, 343, 254 S.E.2d 330, 332 (1979) ("This court is again confronted with the difficult task of resolving a church property dispute."); *Jones* v. *Wolf*, 241 Ga. 388, 388, 260 S.E.2d 84, 84 (1979) (dispute over control and use of church property); *Reddick* v. *Jones*, 251 Ga. 195, 196, 304 S.E.2d 389, 391 (1983) ("This church dispute involves property rights . . . ."); *First Born Church of the Living God, Inc.* v. *Bank South, N.A.*, 221 Ga. App. 739, 739, 472 S.E.2d 469, 470 (1996) ("dispute as to who was authorized to control certain [church] bank accounts"); *Srisovana* v. *Cambodian Buddhist Soc., Inc.*, 269 Ga. App. 600, 602, 604 S.E.2d 637, 640 (Ga. App. 2004) ("disputes involving a nonprofit corporation's board of directors as well as the disposition of church property by that board"); *York* v. *First Presbyterian Church*, 130 Ill. App. 3d 611, 612, 474 N.E.2d 716, 717 (1984) ("The central controversy involves the ownership and control of the property of Anna Church."); *Grace Evangelical Lutheran Church* v. *Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 154, 454 N.E.2d 1038, 1041 (1983) (dispute involving right to purchase real property); *Bjorkman* v. *Protestant Episcopal Church in the United States of America*, 759 S.W.2d 583, 584 (KY 1988) (dispute "as to the ownership of the church property"); *Mount Gideon Baptist Church, Inc.* v. *Robinson*, 812 So. 2d 758, 764 (La. App. 2002) (dispute between two rival factions over control of church, and therefore church property); *Babcock Memorial* v. *Presbytery of Baltimore*, 464 A.2d 1008, 575 (Md. 1983) ("In this case involving a dispute as to ownership and control of church property . . . ." ); *Calvary Presbyterian Church* v. *Presbytery of Lake Huron*, 148 Mich. App. 105, 109, 384 N.W.2d 92, 93 (1986) (dispute over "ownership of real property"); *Benninson* v. *Sharp*, 121 Mich. App. 705, 709,

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apply neutral principles of law to decide church property disputes. *See Jones* v. *Wolf*, 443 U.S. at 602-03. As Petitioners concede, however, this case "involves no dispute over property." (Pet. 19)

Four cases cited by Petitioners in footnote 4 did not involve a church property dispute. In two of those cases, the intermediate state appellate courts applied the rule of judicial deference from *Milivojevich* and held that the controversy was not justiciable because it required an impermissible inquiry into matters of church governance.[7] One case

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329 N.W.2d 466, 468 (1983) ("This is a church property dispute . . . ."); *Shepherd of the Valley Lutheran Church* v. *Hope Lutheran Church*, 626 N.W.2d 436, 441 (Minn. Ct. App. 2001) ("[W]e may resolve the property dispute between SOTV and Hope Lutheran Church by applying neutral principles of law."); *Shirley* v. *Christian Episcopal Methodist Church*, 748 So. 2d 672, 674 (Miss. 1999) (dispute involving "title, use and possession of the church property, both real and personal"); *Presbytery of Elijah Parish Lovejoy* v. *Jaefggi*, 682 S.W.2d 465, 466 (Mo. 1984) ("The principal adversaries in this church property dispute . . . ."); *Tea* v. *Protestant Episcopal Church*, 96 Nev. 399, 400, 610 P.2d 182, 182 (1980) ("This is a declaratory judgment action to determine title to church property."); *Protestant Episcopal Church* v. *Graves*, 83 N.J. 572, 573, 417 A.2d 19, 20 (1981) ("This case involves a dispute over control of local church property."); *Presbytery of Beaver-Butler of United Presbyterian Church* v. *Middlesex Presbyterian Church*, 507 Pa. 255, 257, 489 A.2d 1317, 1318 (1985) ("This is a dispute over the ownership of church property."); *First Presbyterian Church of Schenectady* v. *United Presbyterian Church in the United States*, 62 N.Y.2d 110, 114, 464 N.E.2d 454 (1984) (dispute over "use and enjoyment of the local church property").

7. *Basich* v. *Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82, 86 (Minn. Ct. App. 1995) (pastors' claims against church for breach of contract and breach fiduciary duty were non-justiciable under the First Amendment); *Singleton* v. *Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611 (Minn. Ct. App. 1996) (pastor's claims against church for breach of contract, wrongful discharge and promissory estoppel were non-justiciable under the First Amendment).

addressed the authority of a church board to ratify a contract with building contractor, a purely secular matter. *Chimney Ville Missionary Baptist Church of Garland* v. *Johnson*, 665 So. 2d 730 (La. App. 1995). In the fourth case, the court awarded specific performance of a marriage contract that required the husband to appear before a rabbinical tribunal so that his wife could obtain a decree of divorce under Jewish law. *See Avitzur* v. *Avitzur*, 58 N.Y.2d 108 (1983). That case, however, did not involve a decision from the highest authority of a hierarchical church, nor did it involve the interpretation of a church's constitution or charter. Petitioners have not cited any case in which a court reviewed a constitution or charter of a hierarchical church to determine matters of church governance.

Petitioners elevate form over substance in focusing on the nature of the document and insisting that courts can interpret church constitutions for any purpose whatsoever. The nature of the *document* is not determinative; it is the nature of the *dispute* that determines whether judicial review of a church constitution is permissible. Thus, that some courts have reviewed church constitutions in church property disputes is irrelevant. A property dispute is secular; a governance dispute is ecclesiastical. Thus, Petitioners' church property cases are not in conflict with the Appellate Division's decision.

### C. The State Appellate Courts Are Not Divided On The Issue Of Church Autonomy

Petitioners chide this Court for "nearly three decades of inattention" to church autonomy issues that has led to "utter incoherence" and a "welter of confusion" in the state courts "over what to do when a local congregation leaves the national body." (Pet. 13, 15) That issue, however, is not presented here. No local parish in the Greek Orthodox church has left the Archdiocese, and there is no dispute regarding

the legal or beneficial title to any church property. Thus, even if the state appellate courts were divided (and they are not), this case does not present the facts necessary to resolve the issue.

Regardless, the state appellate courts are not "sharply divided," as Petitioners assert. (Pet. 13) Petitioners draw a false dichotomy between two types of church property cases: those that award the property to a local church, and those that award the property to a national church. The differences in outcomes in these church property cases, however, are entirely attributable to differences in the facts of each case. Indeed, Petitioners fail to point to any misapplication of a legal principle by any court, but merely focuses on the divergent results.

Petitioners' unstated premise is that application of neutral principles of law should always yield the same result, i.e., that property ownership should always be awarded to either the local church or the national church. The application of the doctrine, however, requires a review of secular documents, such as deeds and contracts, to determine ownership of property. Those facts differ from case to case. Thus, in *Presbytery of Beaver-Butler*, the Pennsylvania Supreme Court faithfully applied the neutral principles of law doctrine and ruled that the property belonged to the local church because the local church held record title and there was no equitable trust in the property created in favor of the national church. 507 Pa. at 268-69, 489 A.2d at 1324. In *Babcock Memorial Presbyterian Church*, the Maryland Supreme Court ruled that the church property belonged to the national Presbytery because that church's rules prohibited the local church from alienating its property without permission of the Presbytery. 464 A.2d at 1017. It is hardly "anyone's guess" how these church property disputes will be determined, as Petitioners cavalierly assert. (Pet. 16) For

state courts applying neutral principles of law, the outcome will depend on the application of well established property law to the facts of each case.

As Petitioners note, when deciding property disputes within a hierarchical church, some states have applied a rule of compulsory deference to the decisions of the hierarchy first articulated in *Watson*, rather than the neutral principals of law doctrine. *See, e.g.*, *Benninson* v. *Sharp*, 121 Mich. App. 705, 725, 329 N.W.2d 466, 475 (1983) (noting that outcome would be the same under neutral principals approach as under polity approach); *Protestant Episcopal Church* v. *Graves*, 83 N.J. 572, 577-80, 417 A.2d 19, 22-24 (1981) (noting that there are two generally accepted approaches to resolving church property disputes, the hierarchical (*Watson*) approach and the neutral principles of law approach, and applying hierarchical approach in absence of evidence of express trust). But those cases are consistent with *Jones* v. *Wolf*, which endorsed the neutral principals approach but refused to require states to apply a single approach. "'[A] State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" *Jones* v. *Wolf*, 443 U.S. at 602 (quoting *Maryland & Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).[8]

Thus, the state court church property decisions are not "incoherent"; they are remarkably clear and consistent in their application of *Milivojevich*, *Jones* v. *Wolf*, and other Supreme Court cases. They uniformly adhere to the general rule that hierarchical churches may decide for themselves which entity,

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8. The New York State Court of Appeals has adopted the neutral principles of law approach. *See First Presbyterian Church*, 62 N.Y.2d at 121, 464 N.E.2d at 460, 476 N.Y.S.2d at 93 (1984).

local or national, will own church property and how that property will be treated in the event a local parish breaks from the national church.

Nor has this Court been "inattenti[ve]" to church autonomy issues. This Court has addressed these issues on numerous occasions. *See, e.g.*, *Jones* v. *Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U.S. 696, 710 (1976); *Maryland & Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church* v. *Mary E. B. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871). The state courts have applied these decisions consistently and fairly, demonstrating that no review is warranted here. Although Petitioners allude to other petitions for certiorari that have presented issues of "great moment," none are identified. (Pet. 22). The Court need not reexamine settled principles of law merely because the case law has reached a certain age.

### D. The Appellate Division Did Not Intrude Into Religious Matters

Petitioners take issue with the Appellate Division's conclusion that "if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter." (Pet. 24 (quoting App. 3a)) Petitioners concede that this question "is indeed a religious matter." (*Id.*) They suggest, however, that such a decision might be unnecessary because the parties "might readily reach accord." (*Id.*) Idle speculation that the parties might settle is not a reason to set aside the

First Amendment. Next, Petitioners assert that this statement "completely overlooks the fact that the CLC has no jurisdiction whatever over doctrinal or canonical matters of the church." (Pet. 24) That argument is a non-sequitur.; the Appellate Division's statement concerned the Ecumenical Patriarchate's power, not the CLC's jurisdiction.

Petitioners argue that the court improperly "enter[ed] the theological thicket" by concluding that the Greek Orthodox church is hierarchical, and proceed to lecture on the subtle differences in church governance between different hierarchical churches. (Pet. 25, n.15) Petitioners, however, concede that the Greek Orthodox church is hierarchical. (Pet. 23 ("We have never disputed the fact that the church is hierarchical, which has not ever been at issue.")) Petitioners' contention is, therefore, puzzling.

Petitioners also misinterpret the Appellate Division's decision, arguing that the court made a "naïve and provocative theological judgment that the hierarchical nature of a church excuses it from its contractual or corporate obligations." (Pet. 24-25) The Appellate Division did not so rule. The court merely held that an inquiry into ecclesiastical matters of internal church governance is not justiciable. Repeatedly denigrating the Appellate Division does not advance Petitioners' position: there is nothing "naïve" or "amateurish" about the court's ruling, nor did the court proceed "with blinders on." (Pet. 24, 26) The court's ruling is entirely consistent with the settled law of this Court.

### E. The Appellate Division Correctly Rejected Petitioners' "Impairment of Contract" Argument

Petitioners also argue that the Appellate Division's decision discriminates on the basis of religion. (Pet. 27) According to Petitioners theory, because the Archdiocese's

constitution is a form of a contract, the court must interpret that contract regardless of the ecclesiastical nature of its provisions or the effect of such interpretation on the internal governance of a religious organization.

Petitioners' argument is frivolous. Petitioners cite no authority to support their incorrect contention that contract law trumps the First Amendment's prohibition on governmental interference in ecclesiastical matters. To the contrary, *Milivojevich* is controlling. As discussed above, the *Milivojevich* court expressly refused to interpret the constitutions of the Diocesan and Mother Church, the same alleged "contract" at issue here. *Milivojevich*, 426 U.S. at 721 ("We will not delve into the various church constitutional provisions relevant to this conclusion for that would repeat the error of the Illinois Supreme Court."). Furthermore, the proposition that any church governance document is subject to judicial interpretation because it is a contract is absurd. The law is just the opposite; courts are not entitled to adjudicate ecclesiastical matters, even those that involve contracts.

Contrary to Petitioners' dire predictions, the Court's abstention from determining ecclesiastical matters would not result in "dismissal of virtually all cases brought against a hierarchical church." (Pet. 29) The Archdiocese has not asserted, nor did the court below find, that the Archdiocese's commercial contracts with third parties are shielded from judicial review. The First Amendment bars review of ecclesiastical matters, not commercial transactions.

Moreover, because the Greek Orthodox Church is hierarchical, all adherents consent to be governed by the hierarchy's interpretation of its own governance documents. As the *Watson* court put it:

> All who unite themselves to such a body do so with an implied consent to this government, and

> are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

80 U.S. at 729. Indeed, it is remarkable to argue that the United States Supreme Court's prohibition under *Milivojevich* discriminates against religious claimants. (Pet. 27) To the contrary, it protects religious organizations from the disgruntled few who, dissatisfied with the decisions of church leaders, run to the civil courts in an effort to impose their views on the church and all other parishioners.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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